IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 18, 2009 Session

DONALD WAYNE ROBBINS AND JENNIFER LYNN ROBBINS, FOR THEMSELVES AND AS NEXT FRIEND OF ALEXANDRIA LYNN ROBBINS v. PERRY COUNTY, TENNESSEE, A GOVERNMENTAL ENTITY

Appeal from the Circuit Court for Perry County
No. 3459 Robert E. Lee Davies, Judge

No. M2008-00548-COA-R3-CV - Filed April 28, 2009

Parents of a sixteen-year-old filed this wrongful death action against Perry County alleging that the failure of the Sheriff's Department to serve an Order of Protection was the proximate cause of a single-vehicle accident in which their daughter died. The mother of the decedent obtained an *ex parte* Order of Protection against the daughter's boyfriend. Six days later, prior to the order of protection being served, their daughter was involved in a fatal single-vehicle accident while in the company of the boyfriend. When the parents filed suit for wrongful death under the Governmental Tort Liability Act, Perry County filed a Tenn. R. Civ. P. 12.02(6) Motion to Dismiss claiming, in part, that there was no causal connection between the failure to serve the order of protection and the vehicular accident. The trial court granted the County's Motion to Dismiss. We affirm the dismissal of the Complaint upon the trial court's finding that the Complaint, taking all factual allegations as true and drawing all reasonable inferences from them, does not support a claim for wrongful death because no reasonable person could conclude that the failure to serve the order of protection was either the cause in fact or the legal cause of the vehicular accident and the decedent's death.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

John E. Herbison, Nashville, Tennessee, for the appellants, Donald Wayne Robbins and Jennifer Lynn Robbins.

James I. Pentecost, Jackson, Tennessee, for the appellee, Perry County, Tennessee.

OPINION

Donald Wayne Robbins and Jennifer Lynn Robbins (Plaintiffs), are the parents of Alexandria Lynn Robbins (Ms. Robbins), who died as a result of fatal injuries sustained in a single-vehicle accident that occurred on August 26, 2006. Ms. Robbins sustained fatal injuries when she was thrown from the vehicle; she was sixteen years old at the time of her death. Ms. Robbins and her on-again, off-again boyfriend Marty J. Duncan, an adult male,[1] were the only occupants of the vehicle, and while it is uncertain who was driving the vehicle at the time of the accident, the vehicle belonged to Ms. Robbins' parents. Emergency personnel who responded to the scene stated that there was a strong odor of alcoholic beverage on Ms. Robbins.

Ms. Robbins had been involved in what was described as a "tumultuous" relationship with Marty Duncan. Following one of their breakups in August of 2006, Ms. Robbins' mother obtained an *ex parte* Order of Protection. The order, which was issued on August 18, 2006, directed Mr. Duncan to have no contact with Ms. Robbins pending a hearing on September 5, 2006. The order was delivered to the Perry County Sheriff's Department, however, it was not served upon Mr. Duncan prior to the August 26, 2006 vehicular accident in which Ms. Robbins died.[2]

Plaintiffs filed this action against Perry County on August 24, 2007. In the Complaint they alleged that the failure of the Sheriff's Department to serve the *ex parte* Order of Protection against Mr. Duncan resulted in their daughter's death. Specifically, the Complaint states that had the Sheriff's deputies served the Order of Protection upon Marty Duncan, he "would not have been in contact with Ms. Robbins and furnished her alcoholic beverage on the day of the fatal crash. . . ." The Complaint further states that "the proper performance by Perry County Sheriff's deputies of their duty to serve the Order of Protection upon Marty Duncan would have prevented the death of the Plaintiffs' decedent and that their failure to serve Mr. Duncan proximately caused the death of the Plaintiffs' decedent."

Following a hearing, the trial court granted the County's Motion to Dismiss finding that Plaintiffs had failed to state a claim upon which relief could be granted. The court found in pertinent part that under the facts pled in the Complaint and the reasonable inferences drawn from those facts, a reasonable person could not conclude that the Sheriff's Department's inaction was the legal cause of the decedent's death. This appeal followed.

STANDARD OF REVIEW

The purpose of a Tenn. R. Civ. P. 12.02(6) motion to dismiss is to determine whether the pleadings state a claim upon which relief can be granted. A Rule 12 motion only challenges the legal

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[1]The Complaint states that Marty Duncan had only been an adult for a "brief period."

[2]Tennessee Code Annotated § 36-3-605(c) requires personal service of a copy of the petition for the order of protection, notice of the hearing, and a copy of the *ex parte* order of protection five days prior to the scheduled hearing.

sufficiency of the complaint. It does not challenge the strength of the plaintiff's proof. *See Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). In reviewing a motion to dismiss, we must liberally construe the complaint, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences. *See Pursell v. First American National Bank*, 937 S.W.2d 838, 840 (Tenn. 1996); *see also Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696-97 (Tenn. 2002). Thus, a complaint should not be dismissed for failure to state a claim *unless* it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief. *See Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Fuerst v. Methodist Hospital South*, 566 S.W.2d 847, 848 (Tenn. 1978) (emphasis added). Making such a determination is a question of law. Our review of a trial court's determinations on issues of law is de novo, with no presumption of correctness. *Frye v. Blue Ridge Neuroscience Center, P.C.*, 70 S.W.3d 710, 713 (Tenn. 2002); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

ANALYSIS

When reviewing the grant of a Motion to Dismiss pursuant to Tenn. R. Civ. P. 12.02(6), we only consider the legal sufficiency of the pleadings. *See Bell ex rel. Snyder*, 986 S.W.2d at 554. Therefore, the issue is whether the Complaint is legally sufficient to advance a claim for wrongful death as a result of the County's negligence.[3]

Plaintiffs alleged that the County is liable for their daughter's death because the Sheriff's Department negligently failed to serve the Order of Protection upon Marty Duncan. The contention is that their daughter would not have died in the vehicular accident had the Order of Protection been served; thus, the failure to serve the Order of Protection was a cause in fact and legal cause of the vehicular accident and her death.

In granting the County's Motion to Dismiss, the trial court found that no reasonable person viewing the facts as alleged in the Complaint could conclude that the County's failure to serve the Order of Protection was the legal cause of Ms. Robbins' death. The court focused on the "gaps" between the failure to serve the order of protection and the vehicular accident that caused her death.

[3] In their Motion to Dismiss, the County also asserted two defenses based upon its status as a governmental entity. It argued that service of an order of protection is a discretionary function exempted from liability under Tennessee Code Annotated § 29-20-205(1). It also argued that the service of an order of protection is a public duty which the County owes to the public at large, therefore, the County is immune from liability under the public duty doctrine. As part of this argument, they also assert, contrary to Plaintiffs' claim, that the special duty exception to the public duty doctrine is inapplicable. Our decisions concerning cause in fact and legal cause render these additional issues moot; thus, they are not discussed. Perry County also argued that it had immunity under two other provisions within Tenn. Code Ann. § 29-20-205; however, the County failed to raise these issues in the trial court; thus, they were waived for purposes of this appeal. *See Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996) ("[I]ssues raised for the first time on appeal are waived.").

ESSENTIAL ELEMENTS OF A CLAIM OF NEGLIGENCE

A claim for negligence must establish the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal, causation. *Staples v. CBL & Assocs*., 15 S.W.3d 83, 89 (Tenn. 2000) (citing *White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)). Each element must be proven by the plaintiff by a preponderance of the evidence. *Hale v. Ostrow*, 166 S.W.3d 713, 718 (Tenn. 2005) (citing *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993)).

Two of the essential elements are at issue here, cause in fact and legal cause, which are distinct and which must be proven to establish a claim of negligence. *Hale*, 166 S.W.3d at 718 (citing *Kilpatrick*, 868 S.W.2d at 598). Cause in fact and legal cause are "ordinarily jury questions, unless the uncontroverted facts and inferences to be drawn from them make it so clear that all reasonable persons must agree on the proper outcome." *Id*. (quoting *Haynes v. Hamilton County*, 883 S.W.2d 606, 612 (Tenn. 1994)). Nevertheless, the courts should not submit negligence cases to juries which contain only "a spark or glimmer of evidence that requires the finder-of-fact to make a leap of faith to find the defendant liable for the plaintiff's injury." *Ayrhart v. Scruggs*, No. M2003-00453-COA-R9-CV, 2004 WL 2113064, at *7 (Tenn. Ct. App. Sept. 21, 2004) (quoting *Psillas v. Home Depot*, 66 S.W.3d 860, 866 (Tenn. Ct. App. 2001)).

We will discuss each of these essential elements to determine whether the failure of the Sheriff's Department to serve the Order of Protection on Mr. Duncan in the six days prior to the vehicular accident constituted the cause in fact and legal cause of Ms. Robbins' death.

CAUSE IN FACT

Cause in fact is "the cause and effect relationship that must be established between the defendant's conduct and the plaintiff's loss before liability for that particular loss will be imposed." *Waste Management v. South Central Bell*, 15 S.W.3d 425, 430 (Tenn. Ct. App. 1997) (citing Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353, 1353 (1981)). A defendant's negligent conduct is the cause in fact of the plaintiff's injury "if, as a factual matter, it directly contributed to the plaintiff's injury and without it plaintiff's injury would not have occurred." T.P.I. - Civil 3.21 (8th ed. 2008) (citing *Hale*, 166 S.W.3d at 718-19).

The Complaint set forth the following allegations Plaintiffs contend are relevant to the cause of Ms. Robbins' death:

> 9) On August 18, 2006, the Plaintiff Jennifer Robbins applied for and was granted an *ex parte* Order of Protection from the Perry County General Sessions Court. This

order directed that Marty Duncan have no contact with Alexandria Robbins, pending a hearing which was scheduled for September 5, 2006.

10) This *ex parte* Order of Protection was delivered to Sheriff's deputies to be served on Marty Duncan. The deputies, however, intentionally, recklessly or negligently refused or declined to serve Mr. Duncan with the Order of Protection until after Miss Robbins' death.

14) Alexandria Robbins was fatally injured in a single vehicle accident involving her automobile on August 26, 2006, which occurred while Miss Robbins was in the company of Marty Duncan.

15) Emergency personnel who responded to the scene of the fatal wreck have stated that there was a strong odor of alcoholic beverage about Miss Robbins, whose body was thrown clear of the car.

16) Three bottles of intoxicating liquor were recovered from Miss Robbins' automobile after the fatal wreck.

17) The Plaintiffs aver that Marty Duncan furnished Miss Robbins alcoholic beverage, which caused or contributed to her death.

We can only deduce from the Complaint that Ms. Robbins' death was the result of a single-vehicle accident; however, the Complaint does not state who was driving the vehicle at the time of the accident or how the accident occurred. To determine who or what caused the accident or Ms. Robbins' death would require a substantial amount of speculation and we are not permitted to speculate regarding the mere possibilities of what may have caused Ms. Robbins' death. *See Mullins v. Redmon*, No. W2007-00616-COA-R3-CV, 2007 WL 4415266, at *4 (Tenn. Ct. App. Dec. 19, 2007) (citing *Kirpatrick*, 868 S.W.2d at 602) (holding that a "mere possibility" of causation is not enough, nor is "pure speculation or conjecture"). "[P]roof of causation equating to a 'possibility,' a 'might have,' 'may have,' or 'could have,' is not sufficient, as a matter of law, to establish the required nexus between the plaintiff's injury and the defendant's tortious conduct by a preponderance of the evidence." *Id*. (quoting *Kirkpatrick*, 868 S.W.2d at 602).

The facts alleged in the Complaint and the inferences drawn from them demonstrate nothing more than the fact that Ms. Robbins was in the company of Marty Duncan when the accident occurred, that Mr. Duncan provided the alcohol that was found in the vehicle, that there was a strong odor of alcoholic beverage about her person following the accident, and that Ms. Robbins' death was caused or contributed to by the alcoholic beverages furnished by Mr. Duncan.

Is it possible that the vehicular accident would not have occurred had the Order of Protection been served on Mr. Duncan prior to the accident? The answer to that question is yes; it *might* have

prevented the accident and, thus, it *might* have prevented Ms. Robbins' death. That, however, is not the appropriate question.

The appropriate question is whether there is a "cause and effect relationship" between the failure to serve the Order of Protection and the vehicular accident and, thus, Ms. Robbins' death. *See* T.P.I. - Civil 3.21 (citing *Hale*, 166 S.W.3d at 718-19). The answer to that question is no; thus, the failure to serve the Order on Mr. Duncan was not a cause in fact of Ms. Robbins' death. There are no facts alleged in the Complaint from which to conclude or infer that the failure of the Sheriff's Department to serve the Order of Protection on Mr. Duncan in the six days prior to the accident "directly contributed" to Ms. Robbins' death. Taking all facts asserted in the Complaint as true and drawing all reasonable inferences therefrom, we have determined that no reasonable person would conclude that the failure of the Sheriff's Department to serve the Order of Protection on Mr. Robbins was a cause of the vehicular accident and, thus, a cause in fact of Ms. Robbins' death.

LEGAL CAUSE

Under Tennessee law, for an actor's conduct to be considered the legal cause, the following requirements must be shown:

> First, the actor's conduct must have been a *substantial factor* in bringing about the harm. Next, there must be no legal rule or policy that would operate to relieve the actor from liability. Finally, the harm that occurred must have been reasonably foreseeable by a person of ordinary intelligence and prudence.

Lowery v. Franks, No. 02A01-9612-CV-00304, 1997 WL 566114, at *5 (Tenn. Ct. App. Sept. 10, 1997) (citing *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991)) (emphasis added).

We have determined that the facts asserted in the Complaint do not demonstrate that the failure of the Sheriff's Department to promptly serve the Order of Protection was "a substantial factor" in bringing about the vehicular accident that caused Ms. Robbins' death, and without which her death would not have occurred. *See Lowery*, 1997 WL 566114, at *5; *see also* T.P.I.-Civil 3.22 (8th ed. 2008).

Plaintiffs' assertion that Mr. Duncan would not have been in the presence of their daughter had the Order been served is based on the premise that Mr. Duncan would have obeyed the Order because he would have been subject to arrest for violating the Order. While it is true Mr. Duncan may have stayed away from Ms. Robbins had the Order of Protection been served, and that he would have been subject to arrest for violating the Order, we are not permitted to speculate concerning the possibility that Mr. Duncan caused the accident. A "mere possibility" of causation is not enough, nor is "pure speculation or conjecture." *Mullins v. Redmon*, No. W2007-00616-COA-R3-CV, 2007 WL 4415266, at *4 (Tenn. Ct. App. Dec. 19, 2007) (citing *Kilpatrick*, 868 S.W.2d at 602) (stating a "'possibility,' a 'might have,' 'may have,' or 'could have,' is not sufficient, as a matter of law, to establish the required nexus. . . .").

We acknowledge that Mr. Duncan may not have been with Ms. Robbins had the Order of Protection been served, but that does not establish that Mr. Duncan caused the accident. The allegations in the Complaint provide no basis upon which a reasonable person could conclude that Mr. Duncan caused the accident or Ms. Robbins' death; therefore, we find the Department's failure to serve the Order of Protection was not the legal cause of Ms. Robbins' death.

IN CONCLUSION

Based upon the foregoing, we have determined that the trial court did not err by dismissing the Complaint pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief can be granted because no reasonable person could conclude that the Sheriff's Department's inaction was the cause in fact or the legal cause of Ms. Robbins' death.

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Plaintiffs.

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FRANK G. CLEMENT, JR., JUDGE